



February 3, 2016

Planning Commission  
San Luis Obispo County  
Department of Planning and Building  
976 Los Osos Street, Room 200  
San Luis Obispo, CA 93408-2040

**Re: Phillips 66 Santa Maria Refinery Rail Spur Extension Project – Response to Phillips 66 Comments**

Dear Commissioners,

This letter is submitted by the Environmental Defense Center (“EDC”) on behalf of the Sierra Club, ForestEthics, the Center for Biological Diversity, and EDC, in response to Phillips 66’s letter dated February 1, 2016. First, this letter responds to the assertion that the California Coastal Act’s protections for environmentally sensitive habitat areas (“ESHA”) do not apply to the proposed Rail Spur Extension Project (“Project”). Phillips 66 bases this argument on the grounds that: (1) the area does not qualify as ESHA because it was not mapped as such at the time of application; and (2) even if the area qualifies as ESHA, it may be nevertheless be destroyed to accommodate the Project. As explained here, neither argument is justified under the Coastal Act.

Second, Phillips 66’s comments regarding preemption and the Reduced Rail Deliveries Alternative are unfounded and cannot save the Project. Third, contrary to Phillips 66’s assertions, the scope of analysis of the Project properly includes the mainline and therefore inconsistencies with the Local Coastal Program that arise from mainline impacts support denial of the Project.

**I. The Project Would Destroy Protected ESHA and Dune Vegetation**

It is clear that the Project would destroy ESHA. The FEIR and staff report, along with other evidence in the record, bolster this undeniable fact. It is equally clear that the California Coastal Act mandates protection of ESHA:

Pub. Res. Code § 30240. (a) Environmentally sensitive habitat areas shall be

protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

ESHA is defined in the Act as:

30107.5. "Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

While it is true that the County's Local Coastal Program ("LCP") is the standard for reviewing Phillips 66's application for a coastal development permit, the LCP must be administered in a manner that does not conflict with the Coastal Act.<sup>1</sup> Phillips 66 cannot avoid the fact that the ESHA on the Project site must be protected.

#### **A. ESHA is Present at the Project Site<sup>2</sup>**

The Final Environmental Impact Report ("FEIR") concludes that "the Rail Spur Project area meets the definition of ESHA." (FEIR at 4.4-31) The FEIR describes sensitive plant communities within the development footprint. (FEIR at 4.4-3 – 4.4-7) The FEIR identifies three sensitive plant communities totaling 20.88 acres that would be directly impacted by the Project. (FEIR at 4.4-39) The presence of these sensitive plant communities, along with the ten sensitive plant and animal species, means that the area in question qualifies as unmapped ESHA. The area "[i]s currently occupied by plant species that are listed as Rank 1B status by the California Native Plant Society; and," "[i]s currently occupied by sensitive communities recognized by the California Department of Fish and Wildlife." (FEIR at 4.4-26 and 4.4-31)

In addition, the January 30, 2016, comment letter by Lawrence Hunt Biological Consulting regarding the FEIR supports the FEIR's identification of the site's unmapped ESHA and provides additional reasons why the site contains ESHA.

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<sup>1</sup> Pub. Res. Code § 30005. "No provision of this division is a limitation on any of the following:

(a) Except as otherwise limited by state law, on the power of a city or county or city and county to adopt and enforce additional regulations, *not in conflict with this act*, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone." (Emphasis added.)

<sup>2</sup> Please also see EDC letter to the Planning Commission, February 2, 2016, which provides more detailed discussion of this issue.

**B. The County's Failure to Determine the Presence of Unmapped ESHA at the Project site was not Based on the Best Information**

The County's failure to designate unmapped ESHA at the time of application acceptance was not "based upon the best available information" as required by the CZLUO. (CZLUO § 23.11.030<sup>3</sup>) For example, **the Manual of California Vegetation was available at the time of application acceptance but was not utilized in the determination of whether or not unmapped ESHA was present.** As noted in the staff report, "[t]he Project is located within dune habitat containing sensitive vegetative communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition (i.e., Silver dune lupine – mock heather scrub)."<sup>4</sup> Had the Applicant or County utilized the Manual, which was and remains the State's best available information for identifying plant communities, including rare communities, at or prior to the time of application acceptance, unmapped ESHA would have been identified on the Project site. However, the best available information at the time was not utilized, and because of this failure unmapped ESHA was not documented at the site.

In addition, Hunt's conclusion that the site is unmapped ESHA is supported by numerous cited scientific documents which were available to the applicant and County prior to the time of application acceptance and which could have been used by the applicant or County before application acceptance to demonstrate the site contains unmapped ESHA.<sup>5</sup>

**C. The Project Would Destroy ESHA, in Violation of the Coastal Act and LCP**

According to the FEIR and staff report, the Project would displace 20.88 acres of sensitive native plant communities on the Project site, and would cause further destruction of ESHA in the event of an oil spill. (Staff Report at 16-17; Staff Report Exhibit C at 2-5; see also FEIR at 4.4-39, G-2, G-6, G-10 - 13, and G-66 - 68) As noted in Hunt's comments, the extent of affected ESHA would actually be much greater.

The destruction of ESHA cannot be permitted pursuant to CZLUO § 23.07.170, because the County cannot find that "(1) There will be no significant negative impact on the identified sensitive habitat and the proposed use will be consistent with the biological continuance of the habitat; and (2) The proposed use will not significantly disrupt the habitat." (CZLUO § 23.07.170(b)) The proposed use will negatively impact ESHA, will not be consistent with the biological continuance of the habitat, and will significantly disrupt the habitat.

Moreover, the "override" provision in Pub. Res. Code § 30260 does not apply because (1) alternative locations may be available for this crude oil to be refined; (2) denying the Project

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<sup>3</sup> CZLUO § 23.11.030 provides that "[t]he existence of unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information." (Emphasis added.)

<sup>4</sup> SLO County Planning Commission Staff Report Exhibit A page 1.

<sup>5</sup> Letter from Lawrence Hunt and Associates, Biological Consultants to San Luis Obispo County Planning Commission, January 26, 2016.

would not adversely affect the public welfare (in fact, the opposite is true – denying the Project would protect the public welfare); and (3) adverse environmental effects are not mitigated to the maximum extent feasible.

Finally, denying the Project would not result in an unconstitutional taking of property because Phillips 66 will be able to continue operating the refinery as currently permitted.<sup>6</sup>

**D. The Project would allow Non-Resource Dependent Uses which are Prohibited in Dune Vegetation Pursuant to Coastal Plan Policy 36 Regardless of Whether that Vegetation is considered ESHA**

Furthermore, even if the County found that there was no Unmapped ESHA on the site, which the evidence disproves, the Commission still cannot make the findings for approval of the Project because it would still violate Coastal Plan Chapter 6, Policy 36.

**Terrestrial Environments. Policy 36: Protection of Dune Vegetation**

Disturbance or destruction of any dune vegetation shall be limited to those projects which are dependent upon such resources where no feasible alternatives exist and then shall be limited to the smallest area possible. Development activities and uses within dune vegetation shall protect the dune resources and shall be limited to resource dependent, scientific, educational and passive recreational uses. Coastal dependent uses may be permitted if it can be shown that no alternative location is feasible, such development is sited and designed to minimize impacts to dune habitat and adverse environmental impacts are mitigated to the maximum extent feasible. Revegetation with California native plant species propagated from the disturbed sites or from the same species at adjacent sites shall be necessary for all projects.

Policy 36 protects dune vegetation and disallows any uses in dune vegetation which are not dependent on the resources, regardless of whether the dune vegetation is considered ESHA. Therefore, while evidence proves that the site contains Unmapped ESHA which must be protected pursuant to the Coastal Plan and CZLUO, even if the dune vegetation was not deemed to be ESHA, it is still protected from non-resource dependent uses and development and therefore the Project must be denied.

**II. The FEIR Properly Considers Impacts Along the Mainline Despite Possible Preemption of Certain Mitigation Measures**

Phillips 66's comments regarding preemption and the Reduced Rail Deliveries Alternative are without merit. Phillips 66 states that certain mitigation measures are preempted and therefore not feasible. If that is true and impacts cannot be mitigated to less than significant, then the Project's Class I impacts remain significant and unavoidable, which supports denial of the Project.

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<sup>6</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The Reduced Rail Deliveries Alternative cannot save the Project. Phillips 66 claims that this alternative would reduce impacts to less than significant. However, it only arrives at this conclusion by excluding Class I impacts along the mainline. Even though federal regulation may preempt the County from imposing certain mitigation measures, this preemption does not change the scope of CEQA analysis itself. CEQA analysis includes the whole of the project.<sup>7</sup>

Adopting the position of Phillips 66 would result in improper chopping of the larger Phillips 66 Rail Spur project into a smaller one that looks only at one portion of the project, a project that includes impacts *both* along the mainline and at the refinery site.<sup>8</sup> The mainline emissions are properly within the scope of CEQA analysis.

### **III. The Project's Inconsistency With the LCP Mandates Denial**

Phillips 66 claims the Project need only be "in harmony" with the General Plan to be consistent. While we disagree that the County can ignore inconsistencies with the General Plan, it is also important to note that Phillips 66 overlooks the fact that consistency with the LCP is an unequivocal firm requirement. Because the Project is inconsistent with multiple LCP policies, as articulated in the FEIR and staff report, the Project must be denied. Further, as explained above, the scope of analysis properly includes the mainline and therefore inconsistencies with the LCP that arise from mainline impacts support denial of the Project. The Planning Commission must therefore consider the policy consistency analysis in Exhibit B.

Thank you for your consideration of these comments.

Sincerely,



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Linda Krop,  
Chief Counsel



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Maggie Hall,  
Staff Attorney

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<sup>7</sup> CEQA Guidelines § 15378(a) ("‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...").

<sup>8</sup> See *Bozung v. Local Agency Formation Com.*, 13 Cal. 3d 263, 283-84 (1975) (CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences").



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Cameron Goodman,  
Legal Fellow



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Brian Trautwein,  
Environmental Analyst

cc:     Sierra Club  
         ForestEthics  
         Center for Biological Diversity  
         California Coastal Commission